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Supreme Court, U.S.
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Case No. _____

SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY,

Petitioner,

v.

DOUGLAS RAY MEEKS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, GRANTING A FEDERAL EVIDENTIARY HEARING AFTER A FULL AND FAIR STATE EVIDENTIARY HEARING, VIOLATES THIS COURT'S PRONOUNCEMENT IN KEENEY v. TAMAYO-REYES, 504 U.S. ___, 118 L.Ed.2d 318, 112 S.Ct. ___ (1992).

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DOUGLAS RAY MEEKS,

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 963 F.2d 316 (11th Cir. 1992), and is reproduced in the appendix to this pleading.[1] [A1-A20].

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[1] [A-] represents a citation to the materials contained in the appendix to this pleading.

The decision of the United States District Court for the Northern District of Florida, issued June 28, 1985, is unreported. It is reproduced in the appendix to this pleading. [A21-A51].

The decision of the Florida Supreme Court is reported at 418 So.2d 987 (Fla. 1982), also set forth in the appendix to this pleading [A52-A61]

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on May 29, 1992. A petition for rehearing and suggestion for rehearing in banc was filed and subsequently denied on August 24, 1992. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United states, and subject to the jurisdiction thereof, are citizens of the United states and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

Douglas Ray Meeks was indicted for two first degree murders occurring in separate mini-market robberies in Perry, Florida. The first indictment alleged that Meeks entered a Majik Market convenience store on October 24, 1974, and while engaged in committing a robbery, stabbed to death a store clerk, Chevis Thompson. The second indictment alleged that two weeks later on November 6, 1974, Meeks and his codefendant Homer Hardwick, entered a convenience store and committed an armed robbery in which the store clerk and a customer, Lloyd Walker, were shot. Walker later died of

his wounds. Meeks was tried separately for each indictment.

With regard to the Thompson murder, the record reflects that Thompson, the manager of a Majik Market in Perry, Florida, was viciously knifed to death around 11:00 a.m. The crime was discovered by local youths who saw a lone black male walk out of the store. When they went inside, they discovered the gagging and gasping victim in the last moments of life. The police discovered bloody fingerprints on the cash register; those prints later were found to by Douglas Ray Meeks'. Meeks made incriminating statement to his friends, admitting that he killed Ms. Thompson. At trial, Meeks testified in his own behalf and claimed alibi. He testified that he was out at the 98 Bar at the time of the murder. Meeks denied

admitting to his friends that he killed Ms. Thompson and denied leaving his bloody fingerprint on the cash register.

At the sentencing phase of the Thompson murder, the prosecution used Meeks' prior conviction for first degree murder in the Walker case as an aggravating circumstance to the instant murder. In sentencing Meeks to death, the trial court found the following aggravating factors existed: (1) Meeks had previously been convicted of a capital felony (the Walker murder); (2) the murder was committed during the course of a statutorily enumerated violent felony (robbery); (3) the murder was accomplished with motive of avoiding arrest; (4) the murder was done for pecuniary gain, and (5) the murder was committed to hinder law enforcement or to avoid detection. In mitigation, the

court found Meeks to be of youthful age and of low intelligence. The trial court imposed the death penalty. The Florida Supreme Court affirmed said conviction and sentence of death in Meeks v. State, 336 So.2d 1142 (Fla. 1976).

The Walker murder occurred on November 6, 1974. Meeks and an accomplice, Homer Hardwick, entered a Jr. Food Store in Perry, Florida, and held up a store clerk, Diane Allen and a customer, Lloyd Walker, at gunpoint. Meeks made Ms. Allen empty the cash register and then he and Hardwick marched the victims into the back storeroom area. Meeks ordered the victims to lie on the ground, at which point they were repeatedly shot. Ms. Allen survived, but Mr. Walker died six days later.

Ms. Allen knew Homer Hardwick from high school and later identified him from pictures in her high school yearbook. She identified Meeks in a line-up and told the jury that she was positive beyond any doubt that Meeks was the killer. Meeks presented no affirmative defense at trial. Instead, defense counsel focused on the possible misidentification of Meeks as the killer. The jury rejected this theory and convicted Meeks as charged.

At the sentencing proceeding for the Walker murder, neither side presented any additional evidence. The trial court found four aggravating factors existed: (1) the murder was committed as part of another dangerous felony; (2) that crime was committed for pecuniary gain; (3) the crime was committed to avoid arrest, and (4) the

crime was committed to hinder the enforcement of law. In mitigation, the court found a lack of significant criminal history. The Florida Supreme Court affirmed the death penalty as to this murder in Meeks v. State, 339 So.2d 186 (Fla. 1976).

In 1977, following the United States Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), the Florida Supreme court ordered the sentencing court to conduct a Gardner inquiry to determine whether Meeks' death sentence for the murder of Lloyd Walker was based upon consideration of evidence which was not known to Meeks or which he had no opportunity to explain or deny. The trial court subsequently stated that his decision was based only on information known to Meeks. The Florida Supreme Court found no violation

of the Gardner principle and affirmed. Meeks v. State, 364 So.2d 461 (Fla. 1978).

In 1980, Meeks sought post-conviction relief in the state trial court after a death warrant had been signed by the Governor. The trial court denied relief, however, the Florida Supreme Court granted a stay of execution and ultimately remanded the cause for an evidentiary hearing on the issue of ineffective assistance of trial counsel during the sentencing phase of the Walker trial. Meeks v. State, 382 So.2d 673 (Fla. 1980). After a denial of the Rule 3.850 motion on remand following a full evidentiary hearing, Meeks again appealed and the Florida Supreme Court affirmed. The Court found that neither trial counsel's alleged failure to ask for additional peremptory

challenges during jury selection, nor counsel's introduction into evidence during the penalty phase in which he attempted to demonstrate that Meeks' codefendant was the more dominant participant constituted ineffectiveness of counsel. Meeks v. State, 418 So.2d 987 (Fla. 1982), cert. denied, 459 U.S. 1155 (1983).

Meeks then petitioned for federal habeas corpus relief in the United States District Court for the Northern District of Florida. All relief was denied in 1985. An appeal was taken to the Eleventh Circuit, which stayed the second scheduled execution pending review of Meeks' claim on the merits. In 1987, while Meeks' appeal was still pending, the decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), was decided. As a result, Meeks moved for

leave from the Eleventh Circuit to present his Hitchcock claim to the state courts. Said motion was granted, Meeks v. Dugger, Order issued November 18, 1987.

Meeks filed his petition for writ of habeas corpus in the Florida Supreme Court asserting that "available nonstatutory mitigating evidence was excluded from his sentencing hearing", and therefore he was entitled to a new sentencing proceeding pursuant to Hitchcock v. Dugger, 481 U.S. 393 (1987). The Florida Supreme Court determined that a petition for writ of habeas corpus was not the proper vehicle within which to address the Hitchcock claim and therefore remanded the case to the trial court for an evidentiary hearing directed to the Hitchcock allegations and to determine whether any

error was harmless beyond a reasonable doubt. To date, no evidentiary hearing has resulted from the remand because the parties concurred that resolution of the appeal pending in the Eleventh Circuit could impact on the necessity for a separate harmless error Hitchcock evidentiary inquiry.

As previously noted, the district court denied Meeks' petition for writ of habeas corpus on June 28, 1985. An appeal was filed on June 19, 1985, and ultimately, on May 29, 1992, the Eleventh Circuit issued its opinion in Meeks v. Singletary, reversing and remanding and directing the district court to address Meeks' claim of ineffectiveness of counsel on appeal.

> The court refused to hold an evidentiary hearing on petitioner's claim of ineffectiveness of counsel at trial because petitioner had received a full and fair

hearing on this issue in the state court. The district court's decision of petitioner's claim of ineffectiveness of counsel at trial, much like the state's response, consisted mostly of a summary of testimony given at the hearing on petitioner's motion pursuant to Florida Rule of Criminal Procedure 3.850 in state trial court.

The mere occurrence of a full and fair hearing in the state court, however, does not neutralize petitioner's right to an evidentiary hearing in federal court. 'It is well established that a habeas petitioner is entitled to an evidentiary hearing on a claim *if he or she alleges facts that, if proved at the hearing, would entitle petitioner to relief.*' (cites omitted). True, once a petitioner alleges such facts, and Meeks clearly does, an evidentiary hearing may not be required if a state court has made findings as to those very facts. State court fact findings would then be entitled to a presumption of correctness under 28 U.S.C. §2254(d).

In the present case, however, the Rule 3.850 trial court never made any fact findings pertaining to petitioner's claims of ineffective

> assistance at trial or on appeal. The Florida Supreme Court's opinion affirming the Rule 3.850 court contains at most one passage that conceivably could be interpreted as a fact finding. In its most recent opinion, the Florida Supreme Court summarily and without any fact findings, rejected petitioner's claim of ineffectiveness on appeal. Meeks v. Dugger, 576 So.2d 613, 716 n.3 (Fla. 1991).
>
> Motivated by the mistaken belief that the mere occurrence of a full and fair hearing in state court obviates the need for an evidentiary hearing in federal court, the district court, of course, made no reference to any findings by any state court. Accordingly, we hold that petitioner is entitled to an evidentiary hearing on his claim of ineffective assistance of counsel at trial and on appeal.

963 F.2d at 319-320.

The State, in its suggestion for rehearing in banc of the panel decision, relied heavily on this Court's decision in Keeney v. Tamayo-Reyes, 504 U.S. ___,

118 L.Ed.2d 318, 112 S.Ct. ___ (1992). Rehearing was subsequently denied on all grounds on August 24, 1992.

REASONS FOR GRANTING THE WRIT

WHETHER A PANEL DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS, GRANTING A FEDERAL EVIDENTIARY HEARING AFTER A FULL AND FAIR STATE EVIDENTIARY HEARING, VIOLATES THIS COURT'S PRONOUNCEMENT IN KEENEY v. TAMAYO-REYES, 504 U.S. ___, 118 L.Ed.2d 318, 112 S.Ct. ___ (1992).

In the opinion rendered by a panel of the Eleventh Circuit in Meeks v. Singletary, 963 F.2d 316, 319 (11th Cir. 1992), the court observed:

> The mere occurrence of a full and fair hearing in the state court, however, does not neutralize petitioner's right to an evidentiary hearing in federal court. 'It is well established that a habeas petitioner is entitled to an evidentiary hearing on a claim *if he or she alleges facts that, if proved at the hearing, would entitle petitioner to relief.*' (cites omitted). True, once a petitioner alleges such facts,

> and Meeks clearly does, an evidentiary hearing may not be required if a state court has made findings as to those very facts. State court fact findings would then be entitled to a presumption of correctness under 28 U.S.C. §2254(d).

(emphasis added).

In Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), cited by the panel, the court relied upon a legal theory clearly contrary to this Court's decision in Keeney v. Tamayo-Reyes, 504 U.S. ___, 118 L.Ed.2d 318, 112 S.Ct. ___ (1992), in particular, footnote 5, found at 118 L.Ed.2d 330. Specifically:

> It is asserted by Justice O'Connor that in adopting 28 U.S.C. §2254(d) [28 U.S.C.S. §2254(d)] Congress assumed the continuing vitality of all aspects of Townsend, including the requirement of a hearing in all fifth circumstance cases absent a deliberate bypass. For several reasons, we disagree. First, it is evident that §2254(d) does not codify Townsend's specifications of when a

hearing is required. Townsend described categories of cases which evidentiary hearing would be required. §2254(d), however, does not purport to govern the question of whether hearings are required; rather, it lists exceptions to the normal presumption of correctness of state court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Second, to the extent that it even consider the issue of default, Congress sensible could have read Townsend as holding that the federal habeas corpus standard for cases of default under Townsend's fifth circumstance in cases of procedural default should be the same. Third, §2254(d) does not mention or recognize any exception for inexcusable neglect, let alone reflect the specific standard of deliberate bypass. In the face of this silence, it should not be assumed that if there is to be a judicially created standard for equitable default, it must be no other than deliberate bypass standard borrowed by Townsend

> from a decision that has since been repudiated. . . .

118 L.Ed.2d at 330.

This Court concluded that Tamayo-Reyes would only be entitled to a federal evidentiary hearing, "if he can show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from the failure." 118 L.Ed.2d at 330-331. The Court further observed that, "We also adopt the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused in a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing. (cites omitted)." 118 L.Ed.2d at 331.

In the instant case where the Eleventh Circuit panel's only complaint

is that the lower court failed to fully articulate those findings which support a determination that no ineffective assistance of counsel occurred either at trial or on appeal, said omission does not authorize an appellate court to order further "evidentiary" development. Moreover, the Eleventh Circuit panel has barred the State from asserting that Meeks cannot raise, in the district court, "any instances of alleged ineffectiveness not raised in the state court". In footnote 5 of the panel's opinion, the court concluded:

> On remand, the district court will have to determine which state court findings, if any, constitute findings of fact entitled to a presumption of correctness. We further note that the State, by failing to address the issue, has waived the defense that Petitioner may not present to the district court any instance of

alleged ineffectiveness not raised in state court.

Meeks, 963 F.2d at 320 (emphasis added).

To the extent that any instance of alleged ineffectiveness was not raised in the state court, but may have been raised for the first time in federal court, it is submitted that Meeks, not the State, has the burden of demonstrating exhaustion of that particular claim; Rose v. Lundy, 455 U.S. 509 (1982), or deliberate abandonment.

The instant case is a particularly egregious example of delay prejudicing the State. Where, as here, a full and fair evidentiary hearing was conducted at the state trial level in 1980, it is almost ludicrous to suggest, as the Eleventh Circuit has, that in 1992 further evidentiary development is warranted. The federal district court,

in 1985, armed with the same facts as possessed by the state trial court in 1980, reached the same result - no ineffectiveness of counsel resulted.

In Meeks v. State, 418 So.2d at 988-989, the Florida Supreme Court observed:

> With reference to the asserted criticisms of trial counsel's conduct at jury selection, it must be recognized that the methods of jury voir dire are subjective and individualistic. Many experienced trial lawyers have a strong belief in short voir dire examinations. Conversely, others conduct as extensive an examination as the trial judge will allow. The views of what constitutes the best tactical approach are divergent, and the manner of the examination varies from community to community. What might be appropriate in Palm Beach or Fort Lauderdale may be unacceptable in Pensacola or Marianna. We find this record does not establish any identifiable deficiencies in appellant's trial counsel's voir dire examination; nor do we find his asserted failure to ask for additional

peremptory challenges an erroneous omission by counsel necessitating a conclusion of ineffectiveness.

We also reject the second contention that appellant's trial counsel was deficient by allowing evidence of the codefendant's participation in the crime. It clearly appears that defense counsel attempted to make the codefendant the more dominant participant. In fact, appellant's next assertion of deficiency is that defense counsel did not do enough to establish the dominance of his codefendant, both in the trial on the merits and in the penalty phase. This argument, to be valid, must as a predicate establish the codefendant as the undisputed dominant individual. That fact has not been established in the instant case. We recognize that the dominant individual is a multi-party murder constitutes an important element, particularly where one participant receives the death sentence and the other, as in the instant case, receives only a life sentence. However, we have examined the total record in this cause and conclude that it reflects the codefendant was not the dominant force. We conclude that appellant's trial counsel

> provided reasonably effective assistance of counsel under the instant circumstances.
>
> We reject the third assertion that defense counsel did not properly represent appellant in the sentencing phase of these proceedings. Appellant argues that trial counsel six years ago should have known what the law would be at this time. This is clearly without merit. See Parker v. North Carolina, 397 U.S. 790 (1970); Knight v. State, 394 So.2d 997 (Fla. 1981).

Said findings followed on the heels of the trial court's determination after an extensive evidentiary hearing that:

> Tactics and strategy of counsel at trial as tactics and strategy of counsel at the instant evidentiary hearing, are areas that the trial judge could frequently be tempted to question. The court attempts to refrain from doing so lest it ursurp counsel's role.
>
> Upon consideration of the evidence, the court finds that defendant received reasonably effective assistance of counsel at trial and upon

> appeal based upon the totality of the circumstances of these cases.

418 So.2d at 988 (emphasis added).

It is clear that not all the lower courts could be wrong or for that matter any serious question can be fashioned as to whether a full, fair evidentiary hearing was conducted and whether the lower courts made the requisite findings as to said claim.

Indeed, the Eleventh Circuit panel completely ignored the decision in Keeney v. Tamayo-Reyes, supra, sub judice. Other panels of that court have, however, finally acknowledged the holding in Keeney. For example, in Mathis v. Zant, ___ F.2d ___ (11th Cir. 1992), 6 F.L.W. Fed. C1287, the court reversed and remanded with instructions when a district court granted habeas relief. The court, in its remand,

directed the district court to: (1) articulate the basis for circumventing a presumption of correctness accorded the state court's factual findings; (2) determine the applicability of Keeney v. Tamayo-Reyes, supra, specifically whether the defendant could show cause and prejudice for not presenting evidence to the lower court, and (3) to determine whether the "new evidence" constituted an additional new ineffectiveness claim not yet exhausted per Coleman v. Thompson, 111 S.Ct. 2546, 2554-2555, 115 L.Ed.2d 640 (1991). Ironically, the very mandate of the remand in Mathis is what was done by the lower courts here. A full and fair evidentiary development occurred below and the requisite findings were made to convince at least the State's highest court and the federal district court

that no ineffectiveness had been demonstrated by Meeks. The Eleventh Circuit's panel decision here completely ignores everything that transpired below and merely opines that the district court, in denying relief, did not appreciate what needed to be said.

The Eleventh Circuit's failure to recognize the applicability of Keeney v. Tamayo-Reyes, supra, to the instant circumstances warrants the grant of certiorari and remand for further consideration in light of the aforenoted case.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Douglas Ray MEEKS, Petitioner-Appellant,

v.

Harry K. SINGLETARY, Secretary, Florida Department of Offender Rehabilitation, and Tom Barton, Superintendent of Florida State Prison at Starke, Florida, Respondents-Appellees.

No. 87-3281

United States Court of Appeals, Eleventh Circuit

May 29, 1992.

TJOFLAT, Chief Judge:

Douglas Ray Meeks is a Florida prison inmate. In two separate trials, Meeks was convicted of first degree murder and sentenced to death. 336 So.2d 1142, 339 So.2d 186. Meeks appeals from an order of the United States District Court for the Northern District of Florida denying his petition for a writ of habeas corpus under 28 U.S.C. §2254 (1988) without an evidentiary hearing.

We reverse the district court's denial of habeas relief and remand the case for proceedings consistent with this opinion.

I.

The extended procedural history of this case has been outlined in a recent opinion by the Florida Supreme Court. *See Meeks v. Dugger*, 576 So.2d 713 (Fla.1991). In that opinion, the Florida Supreme Court remanded the case to the state trial court for an evidentiary hearing to determine whether jury instructions given at the sentencing phases of both trials in violation of *Hitchcock v Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), constituted harmless error. *Meeks*, 576 So.2d at 716. Proceedings in the state trial court have been held in abeyance pending our disposition of this appeal.

In his amended federal habeas petition, Meeks asserted thirteen "grounds of illegality of [his] convictions and death sentences."[1] The district court addressed the merits of only two grounds for relief: (1) petitioner's counsel rendered ineffective assistance during the guilt and sentencing phases of petitioner's trials, and (2) petitioner's death sentences were the product of racial discrimination in violation of petitioner's right to equal protection as guaranteed by the Equal Protection Clause of the Fourteenth Amendment, and

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[1] Meeks originally filed separate federal habeas petitions challenging the conviction and sentence resulting from each of his two state trials. He later moved to consolidate his petitions into one petition. For convenience's sake, this opinion does not distinguish between identical challenges to the conviction or sentence in one trial and to the conviction or sentence in the other.

in violation of petitioner's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments.[2] In support of its finding that "only the two issues named above remain," the district court explained:

> Since the remaining grounds asserted in the petition for writ of habeas corpus have never formally been abandoned, the Court notes the following in support of its judgment that only the two issues named above remain. First, as early as December 6, 1983 counsel for petitioner stated in a letter to the court (doc 25) that only two issues remained to be resolved (one of which was effectiveness of counsel). Second, as recently as the status conference of June 6, 1985, only the two issues named above were argued by petitioner's counsel. Finally, the Florida Supreme Court was presented with

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[2] Properly speaking, the latter "ground of illegality" alleged two constitutional violations and tehreby encompassed two claims for relief. *See Clisby v. Jones*, 960 F.2d 925 (11th Cir.1992) (en banc).

> almost all of the issues asserted in the instant petition. In *Meeks v. State*, 382 So.2d 673 (Fla.1980) that Court held that all of petitioner's claims *except* ineffective assistance of counsel and racial discrimination were barred by procedural default.

(Emphasis in original.)

We note at the outset that the district court's reasons for addressing but two of petitioner's claims remain unclear. As the court correctly remarked, petitioner never formally abandoned any claims. The court's order suggests that the court failed to address the merits of petitioner's remaining claims because he informally abandoned them and because the Florida Supreme Court had found some, but not all, of the remaining claims to have been procedurally defaulted. The court's order permits at least three interpretations. First, the court found

that petitioner had abandoned the remaining claims, a conclusion supported by the Florida Supreme Court's finding of procedural default as to "almost all" the remaining issues. Second, although the court found that petitioner never had abandoned the remaining claims, a letter by petitioner's counsel to the court and that counsel's arguments at a status hearing, synergetically combined with the Florida Supreme Court's finding of procedural default as to "almost all" the remaining claims, somehow relieved the district court of its obligation to consider these claims. Finally, the court found both that petitioner had abandoned the remaining claims, and that he was procedurally barred from raising any of them in federal court due to the Florida Supreme Court finding of procedural default as to "almost all" of them.

For purposes of this opinion, we adopt the third, and most charitable, reading of the district court's order. We first address the two claims the district court decided to consider on the merits: "ineffective assistance of counsel" and "racial discrimination." The latter claims is without merit in light of *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Before delving into a discussion of the ineffectiveness claim the district court did discuss, we briefly comment on the ineffectiveness claim it did not. Petitioner raised two distinct claims of ineffective assistance of counsel, one pertaining to his counsel's performance at the guilt and sentencing phases of his two trials, the other relating to that counsel's performance on appeal from petitioner's convictions and

sentences. As the State's response had done, the district court's order addressed only the former claim of ineffectiveness. Even the catch-all phrase at the end of the court's order refers solely to trial counsel's errors at trial and makes no reference to errors on appeal: "Having reviewed the complete record and all of petitioner's remaining assertions of errors by trial counsel, it is the judgment of this Court that no such errors were reasonably likely to have an effect on petitioner's trials sufficient to warrant reversal." On remand, we direct the district court to address petitioner's claim of ineffectiveness of counsel on appeal.

The court refused to hold an evidentiary hearing on petitioner's claim of ineffectiveness of counsel at

trial because petitioner had received a full and fair hearing on this issue in the state court. The district court's discussion of petitioner's claim of ineffectiveness of counsel at trial, much like the State's response, consisted mostly of a summary of testimony given at the hearing on petitioner's motion pursuant to Fla.R.Crim.P. 3.850 in state trial court.

The mere occurrence of a full and fair hearing in the state court, however, does not neutralize petitioner's right to an evidentiary hearing in federal court. "It is well established that a habeas petitioner is entitled to an evidentiary hearing on a claim *if he or she alleges facts that, if proved at the hearing, would entitle petitioner to relief.*" *James v. Singletary*, 957 F.2d 1562,

1573 n.17 (11th Cir.1992) (citing *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963); *Thomas v. Zant*, 697 F.2d 977, 983 (11th Cir.1983)). True, once a petitioner alleges such facts, and Meeks clearly does, an evidentiary hearing may not be required if a state court has made findings as to those very facts. State court fact findings would then be entitled to a presumption of correctness under 28 U.S.C. §2254(d).

In the present case, however, the rule 3.850 trial court never made any fact findings pertaining to petitioner's claims of ineffective assistance at trial and on appeal.[3] The Florida

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[3] The Florida Supreme Court quoted the relevant portions of the trial court's findings in *Meeks v. State*, 418 So.2d 987, 988 (Fla.1982):

> From the vantage point of hindsight of five years,

Supreme Court's opinion affirming the rule 3.850 court contains at most one

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defendant, through his present counsel, assaults the conduct of his defense by his former counsel. although told that his former counsel was present for testimony, defendant did not choose to call him to explain his conduct of the trial and appeal. The State did not call former counsel. Nor did the Court. Thus, counsel whose conduct of the trial and appeal is in question did not testify.

Both defendant and the State did call attorneys to testify as expert witnesses. Opinions were expressed by them as to trial counsel's effectiveness. Defendant also made proffers as to racial attitudes in Taylor County as they existed at trial time and at the present as well as concerning defendant's background. Upon consideration, the court finds that the greater weight of the evidence does not support defendant's contention that he did not receive reasonably effective assistance of counsel.

Tactics and strategy of counsel at trial, just as tactics and strategy of counsel at the instant evidentiary hearing, are areas that the trial judge could frequently be tempted to question. The court attempts to refrain from doing so lest it usurp counsel's role.

passage that conceivably could be interpreted as a fact finding.[4] In its most recent opinion, the Florida Supreme Court summarily, and without any fact findings, rejected petitioner's claim of ineffectiveness on appeal. *Meeks v. Dugger*, 576 So.2d 713, 716 n.3 (Fla.1991).

> Upon consideration of the evidence, the court finds that defendant received reasonably effective assistance of counsel at trial and upon appeal based upon the totality of circumstances of these cases.

[4] "We find this record [the trial transcript? the rule 3.850 petition? the rule 3.850 hearing?] does not establish any identifiable deficiencies in [Meeks'] trial counsel's voir dire examination; nor do we find his asserted failure to ask for additional peremptory challenges an erroneous omission by counsel necessitating a conclusion of ineffectiveness." *Meeks*, 418 So.2d at 988.

Motivated by the mistaken belief that the mere occurrence of a full and fair hearing in state court obviates the need for an evidentiary hearing in federal court, the district court, of course, made no reference to any findings by any state court. Accordingly, we hold that petitioner is entitled to an evidentiary hearing on his claims of ineffective assistance of counsel at trial and on appeal.[5]

We now discuss the district court's grounds for not addressing all but two of petitioner's claims: abandonment and procedural default. Although the

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[5] On remand, the district court will have to determine which state court findings, if any, constitute findings of fact entitled to a presumption of correctness. We further note that the State, by failing to address the issue, has waived the defense that petitioner may not present to the district court any instances of alleged ineffectiveness not raised in state court.

district court acknowledges that petitioner never "formally" abandoned any claims, it cites a letter from petitioner's counsel to the court of December 6, 1983, and the status conference of June 6, 1985, in support of its conclusion that petitioner, presumably informally, had abandoned all but two claims. Our review of the letter and the transcript of the status hearing has failed to produce any evidence that petitioner abandoned any claims. Certainly, neither the letter nor the transcript of the status conference permits the conclusion that petitioner knowingly, voluntarily, or intentionally abandoned any claim. *See Potts v. Zant*, 638 F.2d 727, 747-51 (5th Cir. Unit B), *cert. denied*, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981); *Potts v. Zant*, 734 F.2d 526, 528-29 (11th

Cir.1984), *cert. denied sub nom. Kemp v. Potts*, 475 U.S. 1068, 106 S.Ct. 1386, 89 L.Ed.2d 610 (1986).

First, the December 6 letter simply did not contain the statement the district court ascribed to it. Instead of stating "that only two issues remained to be resolved," the letter remarked that "one of the two primary issues in Mr. Meeks' case is the sufficiency of legal representation at trial, sentencing, and direct appeal." The letter responded to a May 31, 1983, order to show cause why Meeks' petition ought not be granted, and to indicate the time needed for an evidentiary hearing. The letter nowhere seeks to narrow the issues before the district court. Instead, it dovetailed the petitioner's November 30 motion for continuance of the evidentiary hearing -

which never materialized - pending the resolution of the ineffective assistance issue in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which at that time was before the United States Supreme Court.

Likewise, nothing in the transcript of the status hearing as much as hints at abandoned of any claims. The district court's correct observation that petitioner's counsel argued only the two claims the court later decided to address on the merits does not support a finding of abandonment. Without belaboring the point, we hold that a finding of abandonment of any claims based on counsel's failure to address all claims at the status hearing in the case, without inquiry or notice by the court, constitutes a "trap for the unwary" we cannot countenance. *See*

Lefkowitz v. Newsome, 420 U.S. 283, 293, 95 S.Ct. 886, 891, 43 L.Ed.2d 196 (1975).

The district court's other rationale for not addressing more than two of petitioner's thirteen claims, namely its reference to the Florida Supreme Court's statement that "almost all" of petitioner's claims had been procedurally defaulted, rests on similarly shaky ground. First, a state court's finding of procedural default with respect to a given claim does not automatically raise a procedural bar against consideration of that claim on federal habeas. A federal habeas petitioner may excuse state procedural default of a claim either by "demonstrat[ing] cause for the default and actual prejudice as a result of the alleged violation of federal law," or by

establishing "that failure to consider the claim[] will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991); *see also McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991). In particular, a federal habeas petitioner may establish cause by demonstrating ineffective assistance on direct appeal. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *see also Coleman*, ___ U.S. at ___, 111 S.Ct. at 2567-68. As mentioned above, Meeks presented a claim of ineffectiveness on appeal, though the district court ignored it in its order. Moreover, even if petitioner should not succeed in excusing his failure timely to raise the claims found by the Florida Supreme Court to have been procedurally

defaulted, the Florida Supreme Court's 1980 finding obviously does not affect claims petitioner had not even raised at that time. The district court itself acknowledges that Meeks' petition contains such claims by observing that the Florida Supreme Court in 1980 had found "almost all" of petitioner's remaining claims to have been defaulted.

On remand, we instruct the district court carefully to discern exactly which claims the Florida Supreme Court identified as procedurally defaulted. With respect to these claims, the district court must then consider whether petitioner can demonstrate either cause and prejudice for his default, or a fundamental miscarriage of justice. The district court should address the merits of all other claims, unless it can articulate its reason or reasons for not doing so.

II.

For the reasons state above, we REVERSE the denial of habeas corpus relief and REMAND the case for proceedings in accordance with this opinion.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

DOUGLAS RAY MEEKS,

Petitioner,

vs CASE NO. TCA 80-7466-MMP

LOUIE WAINWRIGHT, et al.,

Respondents.

ORDER

Currently pending before this Court is Meeks' Petition for Writ of Habeas Corpus (doc 3). Petitioner's accompanying motion for stay of execution (doc 5) was granted and ruling on the petition was reserved (doc 14). At the request of petitioner's counsel (doc 25) this court delayed ruling on the petitioner for writ of habeas corpus until the United States Supreme Court handed down a decision in Strickland v. Washington, 673 F.2d 879 (5th Cir. Unit

B) reh. en banc, 693 F.2d 1243 (5th Cir. Unit B 1982) cert. granted, 103 S.Ct. 2451 (1983). Strickland v. Washington, 104 S.Ct. 2052 (1984) is now a published opinion, and this petition is ripe for decision.

Petitioner was convicted in the Circuit Court of the Third Judicial Circuit in and for Taylor County, Florida in two separate cases, on March 12, 1975 and June 4, 1975. Both convictions resulted in sentences of death. For purposes of clarity, the procedural history of each of petitioner's cases is summarized below.

In lower court case number 74-299, petitioner was convicted of murdering Lloyd Walker. The Florida Supreme Court affirmed, Meeks v. State, 339 So.2d 186 (Fla. 1976). Subsequently, on its own motion, the Florida Supreme Court issued

an order to the trial court to determine whether petitioner's death sentence had been based upon the consideration of evidence unknown to petitioner or which petitioner had no opportunity to explain or deny. This order was based on the Rule of Law announced in Gardner v. Florida, 480 U.S. 349 (1977). In response to this Gardner inquiry, the trial judge stated that he had considered a psychiatrist's report which had not been shown to petitioner. The Florida Supreme Court then remanded for resentencing. Petitioner was once again sentenced to death, and the Supreme Court of Florida affirmed. Meeks v. State, 364 So.2d 461 (Fla. 1978). The petition to the United States Supreme Court for writ of certiorari which followed was denied. Meeks v. Florida, 439 U.S. 991 (1978). Petitioner then

filed a motion to vacate, set aside or correct sentence pursuant to Fla.R.Crim.P. 3.850, which the lower court denied. On appeal, the Florida Supreme Court held that an evidentiary hearing on the claim of ineffective assistance of counsel was required. The Court also held that petitioner's claim of racial discrimination did not warrant an evidentiary hearing. Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). Upon remand, the trial court conducted a three day long hearing. The trial court's denial of petitioner's 3.850 motion was affirmed by the Florida Supreme Court. Meeks v. State, 418 So.2d 987 (Fla. 1982). The Governor of Florida denied commutation of the death sentence after a clemency hearing.

In lower court case number 74-300, petitioner was convicted of murdering

Chevis Thompson. The Supreme Court of Florida affirmed, Meeks v. State, 336 So.2d 1142 (Fla. 1976). Petitioner states that a motion for rehearing was then filed and denied. In response to a Gardner inquiry by the Florida Supreme Court, the trial judge stated that the sentence was based exclusively on information known to petitioner. See Meeks v. State, 382 So.2d 673, 674 (Fla. 1980). Petitioner filed a motion under Fla.R.Crim.P. 3.850. When the Florida Supreme Court remanded for an evidentiary hearing on effectiveness of counsel, the trial court was directed to consider the effectiveness of counsel in both of petitioner's trials. Meeks v. State, 382 So.2d 673 (Fla. 1980). From that time forward, the two cases have been reviewed together. As stated above, the trial court held that

petitioner received effective assistance of counsel and the Florida Supreme Court affirmed.

The petition for writ of habeas corpus asserts numerous grounds for relief. However, only two of those asserted grounds are properly before this Court. The two pending issues are:

1. Whether petitioner was denied effective assistance of counsel, and

2. Whether petitioner's sentence of death was the product of invidious racial discrimination, with an impact rendering Florida's death penalty statute unconstitutional. Since the remaining grounds asserted in the petition for writ of habeas corpus have never formally been abandoned, the Court notes the following in support of its judgment that only the two issues named above remain. First, as early as

December 6, 1983 counsel for petitioner stated in a letter to the court (doc 25) that only two issues remained to be resolved (one of which was effectiveness of counsel). Second, as recently as the status conference of June 6, 1985, only the two issues named above were argued by petitioner's counsel. Finally, the Florida Supreme Court was presented with almost all of the issues asserted in the instant petition. In Meeks v. State, 382 So.2d 673 (Fla. 1980) that Court held that all of petitioner's claims except ineffective assistance of counsel and racial discrimination were barred by procedural default. Therefore, this Court cannot consider those claims. Engle v. Isaac, 102 S.Ct. 1558 (1982).

In connection with his second claim, of racial discrimination, petitioner has filed a motion for

discovery which is still pending (doc 23). The claim that Florida's death penalty statute is discriminatorily applied on the basis of race has been conclusively resolved adversely to petitioner. See Wainwright v. Ford, 104 S.Ct. 3498 (1984); Wainwright v. Adams, 104 S.Ct. 2183 (1984); Sullivan v. Wainwright, 104 S.Ct. 450 (1983); McCleskey v. Kemp, 753 F.2d 877, 897 (11th Cir. 1985) (en banc) (Supreme Court has rejected the claim that the Florida death penalty is unconstitutionally applied on the basis of race); Smith v. Wainwright, 741 F.2d 1248 (11th Cir.) Reh. denied en banc, 747 F.2d 1468 (11th Cir. 1984) (District Court properly denied petitioner an evidentiary hearing, the issue of discriminatory application of the Florida death penalty has been

conclusively resolved); Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984). Petition for writ of habeas corpus is DENIED on this ground. Motion for discovery to supplement statistical evidence of discriminatory impact is DENIED AS MOOT.

The other issue remaining in the petition for writ of habeas corpus is the claim of ineffective assistance of counsel. Of course, this claim will now be reviewed under the standards explained in Strickland v. Washington, 104 S.Ct. 2052 (1984). Under Strickland, the conduct of counsel is afforded a heavy presumption of effectiveness. Strickland v. Washington, 104 S.Ct. at 2066. Petitioner bears the burden of demonstrating both that counsel's decisions were not strategic choices

based on professional judgment and that there is a reasonable probability that (but for counsel's unprofessional errors) the result of the proceeding would have been different. In other words, petitioner "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland v. Washington, 104 S.Ct. at 2064.

The State Court ruling on effectiveness of counsel is not binding on this Court because it is a mixed question of law and fact. Strickland v. Washington, 104 S.Ct. at 2070. The legal standard applied by the state trial court was the same as that applied by the trial court in Strickland. Both trial judges applied the standard of Knight v. State, 394 So.2d 997 (Fla. 1981). See Meeks v. State, 418 So.2d

987, 989 (Fla. 1982); Strickland v. Washington, 104 S.Ct. at 2059. The United States Supreme Court held in Strickland that the Knight standard was sufficiently similar to that established in Strickland that the fact finding below was not affected by erroneous legal principles. Strickland v. Washington, 104 S.Ct. at 2070. Furthermore, petitioner had a full and fair opportunity to litigate the claim of ineffective assistance of counsel in the State Court. Since petitioner has had this full and fair opportunity to present his claim under the appropriate legal standard, no new evidentiary hearing is required to enable this Court to decide petitioner's claim anew.

In considering petitioner's claim, this Court has reviewed the transcripts of both trials, the published opinions

in the course of petitioner's appeals and the transcript of the evidentiary hearing on effectiveness held by the State Trial Court. Unless otherwise designated, all page references are to the transcript of the evidentiary hearing. A brief summary of the testimony is presented at that hearing follows:

David Michael Lipman, Esq., testified on petitioner's proffer (pages 45-67) concerning disbursement of municipal and county services as an indicator of racial bias. The purported relevance of this testimony was to demonstrate that petitioner's trial counsel was ineffective for his failure to conduct more extensive voir dire into the racial attitudes of prospective jurors (page 38).

Gerald Shofner, a Ph.D. with expertise in race relations also testified on proffer after state objections to the relevance of his testimony. Dr. Shofner was called to the stand to substantiate the historical basis for the disparities in treatment to which Mr. Lipman testified. Petitioner's counsel stated (page 87) that he expected to show that trial counsel "was a virtual stranger to this area of Florida". Again, the purpose of this testimony was to show that voir dire should have been expanded.

Reverend Wayne Griffen, formerly of Perry, Florida (page 95) testified concerning racial tensions in Perry at the time of petitioner's trials (pages 96-101). Reverend Griffen also testified concerning the reaction in the community to petitioner and to the

crimes of which he was accused (page 103).

Jimmy Hunt, Esq., testified next. Mr. Hunt was trial counsel for Homer Hardwick; Mr. Hardwick was convicted in a separate trial of participating in the murder of Lloyd Walker. A jury recommended that Honer Hardwick receive a life sentence (page 440). Clearly Jimmy Hunt was called to the stand to compare his performance to that of petitioner's trial counsel. Mr. Hunt was asked about pre-trial motions. Particularly, petitioner's counsel questioned Jimmy Hunt about filing a motion for change of venue (pages 111-114). That motion was denied (page 126). Mr. Hunt was also asked to testify about taking depositions (page 114), requesting additional peremptory challenges (page 118), moving for

dismissal of the indictment and for a continuance (page 120-121). Mr. Hunt testified that the denial of his motion for dismissal of the indictment was affirmed on appeal (page 125). The depositions taken by Mr. Hunt were part of the Court file and available for anyone to review (page 128).

Stephen Bernstein, Esq., testified as to what actions would characteristically have been taken by competent counsel in a capital case in the 1970's. He discussed constitutional attacks on the death penalty (pages 149-152; 157-158), requesting additional peremptory challenges (page 152), moving for psychological examinations to support mitigating circumstances and avoiding a "guilt prone" jury (pages 159-161). Mr. Bernstein testified at length about the importance of the voir

dire and the voir dire conducted in these cases (pages 165-172). He stated that he could not say petitioner's counsel's voir dire was ineffective assistance, that it could have been a strategy decision (page 170). Attorney Bernstein also discussed the importance of counsel being familiar with the community and the corresponding need for more searching voir dire when one was unfamiliar (pages 172-175). Stephen Bernstein did state his opinion that the failure to delve more deeply into what prior information prospective jurors had about the case was ineffective (page 176).

Craig Bernard, Esq., testified that trial counsel's failure to raise a constitutional challenge was evidence of a lack of preparation, though not ineffectiveness per se (page 243). Mr.

Barnard stated that asking prospective jurors for the details of the pretrial publicity to which they had been exposed could poison the entire panel (page 249). In such a case, an individual voir dire would be "necessary" (page 249). Also, Mr. Barnard stated that a motion for change of venue might have been called for, but he couldn't say for certain (page 250). Craig Barnard also opined that the record was not properly preserved for appeal (page 250-251). Specifically, Mr. Barnard considered the failure to preserve an objection to the answer to the question sent out by the jury during deliberations as evidence of ineffectiveness (page 254). Mr. Barnard went on to state his opinion that petitioner did not receive effective assistance of counsel in the penalty phase of case number 299 (page 262) and

that the briefs filed on Appeal were inadequate (page 266).

Mr. Mack was brought to the stand to testify to racial discrimination in Perry, to establish that trial counsel was ineffective for failing to explore more deeply the possibility of racial bias (page 302). Jeoff Smith testified to corroborate Mr. Mack's testimony. These two men performed an experiment, visiting various drinking establishments in Perry to see if Mr. Mack (a black man) would be treated differently than Mr. Smith (a white man). He was.

Elizabeth "Budd" Bell testified for the petitioner as an expert in child development. The purpose of the testimony she gave on proffer was to show that trial counsel was ineffective for failing to develop mitigating information at the sentencing stage

concerning petitioner's childhood (page 364). Mrs. Bell testified that, as a child, petitioner suffered from nutritional deprivation and received only intermittent schooling (pages 366-367). She testified that petitioner's childhood development led to a lack of comprehension and a low self-esteem (pages 272 and 273), also that petitioner has a low IQ of 75 (page 379). Mrs. Bell stated that, in her opinion, petitioner is impressionable and easily led (pages 379-381).

John Weed, Esq., testified, on behalf of the state, as an expert witness on criminal trial practice. Mr. Weed stated that he had read the transcript of one of petitioner's trials (page 324) and found no glaring errors (page 324). In John Weed's opinion, petitioner's counsel was reasonably

effective (page 325). Mr. Weed testified that in felony cases he tried to learn about prospective jurors in advance, because voir dire doesn't reveal much information (page 330).

Martin Page, Esq., testified for the state as an expert in criminal trial practice. Mr. Page testified that he had read the transcripts of both trials, that he did not see any clear evidence of incompetency on the part of defense counsel (page 341).

Virlyn Willis, Esq., testified for the state as an expert in criminal trial practice. Mr. Willis was the prosecutor in petitioner's trials. He testified that in both cases the state had strong evidence against petitioner. "The case in which the Walker boy was the victim was a very strong case, because of eye witness testimony of the corroboration.

The case against Chevis - where Chevis Thompson was the victim was a strong case because of - evidence at the scene." (page 392). Mr. Willis stated that, in his opinion, petitioner received reasonably effective representation (page 396).

Finally, Jimmy Hunt was recalled to the stand. Mr. Hunt testified that he sought a continuance between the guilt/innocence and sentencing phases of Homer Hardwick's trial to obtain a psychiatric report for possible use in mitigation (page 438). Mr. Hunt stated he could not recall whether he called any witnesses in the second phase (page 439) but he definitely contacted family members and other potential witnesses (page 439) Mr. Hunt also stated that he considered petitioner the more culpable person, the dominant actor, and very

likely the person who actually fired the fatal shots (page 441). In addition, Mr. Hunt stated that this opinion would probably not be affected by knowledge of a psychiatric report indicating that petitioner was more likely to be led than to be a leader (page 446). In response to questions from the Court, Mr. Hunt stated that, unless the first psychiatrist failed completely to explore questions relevant to mitigation, there would be no reason to obtain a second psychiatric evaluation prior to sentencing if one had already been prepared prior to trial. (pages 448-449).

During the course of this hearing petitioner was informed that trial counsel was present and available to testify (page 388). Petitioner elected, on the record, not to put trial counsel

on the stand (page 389). The judgment of the trial court was that defendant received reasonable assistance of counsel at trial and on appeal. The Florida Supreme Court affirmed, Meeks v. State, 418 So.2d 987 (Fla. 1982).

Petitioner's allegations concerning the conduct of voir dire are insufficient. The voir dire was not so obviously ineffective on its face as to destroy the presumption of effectiveness. It is clear that petitioner seeks to establish that "as a stranger to this part of Florida" counsel was remiss for not asking more questions. Yet, trial counsel was from Cross City, Florida (trial transcript case number 74-300 page 5). This Court takes judicial notice of the fact that Cross city and Perry are neighboring communities, approximately 50 miles

apart. As such, counsel presumably knew the contents of the newspaper reports read by jurors, as well as general information about the community and the panel. These same facts lead the Court to the conclusion that the decision not to move for a change of venue was not ineffective assistance. Additionally, since Homer Hardwick's motion for change of venue was denied, petitioner has failed to demonstrate any prejudice in this regard.

Petitioner asserts that his trial counsel rendered ineffective assistance by his failure to investigate, develop or present a defense. There is no merit to petitioner's contention that trial counsel should have presented a defense of insanity despite the psychiatrist's conclusion that petitioner was sane. In the trial for the murder of Chevis

Thompson, trial counsel presented an alibi defense which the jury rejected. There is no evidence before this court to support a conclusion that any better defense existed. Considering the evidence of petitioner's guilt, trial counsel appears to have rendered reasonable assistance in the circumstances.

Petitioner criticizes counsel's failure to continue objections to the introduction into evidence of Hardwick's fingerprint. This appears to be the kind of strategy decision which will not be disturbed on review. Petitioner states that counsel was unprepared for the sentencing phase of the first trial. There has been no testimony concerning preparations made before trial, or concerning what information petitioner gave his attorney. This Court cannot

infer that counsel was unprepared from counsel's response to the query whether he had additional testimony: "No Your Honor, not that I know of right now, not until I talk to my client, to see if there is anything that would be in his favor. I don't know of any witnesses." Counsel clearly knew of his duty to investigate. In that same conference counsel requested a continuance of the second trial, stating that his involvement in the first trial had hampered his ability to investigate. Counsel expressed concern that lack of opportunity to investigate for the second trial would render his assistance in that trial ineffective (trial transcript case number 74-299 page 410). That eventuality did not arise, a continuance of the second trial was granted. In connection with his claim

that counsel was unprepared for sentencing in the first case, petitioner also asserts counsel was ineffective for failing to seek a continuance in order to have time to develop mitigating evidence. Aside from the fact that petitioner has provided no evidence to overcome the presumption that counsel prepared earlier, this was clearly a strategic decision which this Court may not disturb. Counsel stated that he wished to go ahead so that the sentencing would not take place after the second trial. If the second trial resulted in a conviction, that conviction might have been presented as an "aggravating circumstance" in the sentencing from the first trial (trial transcript case number 74-299 page 402).

Petitioner states that counsel never contacted his family or other

potential character witnesses. There is nothing in the record to indicate this. Nor, assuming counsel failed to investigate in this manner, is there any evidence concerning what led counsel to make such a decision. This Court must defer to the investigative decision made by competent counsel. Strickland v. Washington, 104 S.Ct. at 2066. See also Mitchell v. Kemp, No. 83-8649 (11th Cir. May 23, 1985). As stated above, it is clear that counsel knew of his duty to investigate. Petitioner has failed to carry his burden of demonstrating both the asserted error of counsel and the prejudicial effect thereof.

Petitioner also faults his trial counsel for failing to develop evidence of his mental inability and the possibility that he was dominated by Hardwick. Petitioner states that

counsel should have presented evidence of a prior incarceration in a mental institution. This evidence would not necessarily have supported petitioner's case. Petitioner was sent to a hospital for evaluation because of "inappropriate behavior" and was released after "a very short period of time", according to Mrs. Bell (page 385), with a recommendation of private psychiatric treatment. The decision not to attempt to persuade the jury that petitioner was dominated by Mr. Hardwick was a strategic choice which this Court cannot fault. As Mr. Hunt stated, all the evidence indicated that petitioner was the dominating and more culpable party. Petitioner's trial counsel had the information he received from petitioner and the results of a psychiatric examination and made a strategic decision based on those facts.

Likewise, the failure to request a presentence investigation was apparently a strategic decision. There is no evidence to support an inference that such an investigation would have made a difference. On the contrary, it is as likely as not, considering that petitioner had a history of inappropriate behavior, that evidence best avoided was not discovered due to the decision not to request a PSI. That was the conclusion reached in Strickland v. Washington, 104 S.Ct. at 2059 on similar facts.

Petitioner makes additional allegations that he received ineffective assistance because of counsel's failure to rebut certain arguments and one incident of inartful questioning. No one is entitled to perfect counsel. Having reviewed the complete record and

all of petitioner's remaining assertions of errors by trial counsel, it is the judgment of this Court that no such errors were reasonably likely to have an effect on petitioner's trials sufficient to warrant reversal. Accordingly, it is ORDERED,

Petition for writ of habeas corpus is DENIED.

The stay of execution previously entered by this Court is hereby LIFTED.

DONE AND ORDERED this 28th day of June, 1985.

Maurice M. Paul
United States District Judge

SUPREME COURT OF FLORIDA

No. 59,958

DOUGLAS RAY MEEKS, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[June 17, 1982]

PER CURIAM.

This is an appeal from a denial, after evidentiary hearing, of appellant's post-conviction relief motion under Florida Rule of Criminal Procedure 3.850, asserting ineffective assistance of trial counsel. Appellant was convicted of a convenience store armed robbery, at which he and an accomplice forced a store clerk and customer to lie on the floor. Appellant

then fired five execution-type shots, killing the customer but, fortunately, only wounding the clerk, who later testified that appellant was the one with the gun.

This is the fourth occasion that this case has appeared before this Court. The initial trial, in March, 1975, was one of the first death cases tried under the newly approved death sentence procedures. We have detailed the facts of this case in our three prior reviews. In Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991 (1978), we reviewed appellant's trial on the merits and affirmed his conviction and sentence of death. In Meeks v. State, 364 So.2d 461 (Fla. 1978), this Court reaffirmed the imposition of the death sentence, after a remand for resentencing in order to

comply with the dictates of Gardner v. Florida, 430 U.S. 339 (1977). The Gardner violation was discovered after the original opinion issued. In Meeks v. State, 382 So.2d 673 (Fla. 1980), we found the allegations contained in that part of appellant's 3.850 motion relating to ineffective assistance of counsel required an evidentiary hearing, and we remanded for that purpose. It is the review of that proceeding which is now before us.

Appellant contends that his trial counsel was ineffective, claiming (1) that counsel conducted inadequate jury voir dire and failed to seek and obtain additional peremptory challenges; (2)

*This decision should not be confused with Meeks v. State, 336 So.2d 1142 (Fla. 1976), which concerns a review of an entirely independent murder conviction and sentence of death.

that counsel improperly allowed the prosecutor to present evidence relating to appellant's codefendant and failed to properly pursue a strategy of establishing the codefendant's greater culpability; and (3) that appellant's original trial counsel was unprepared for the sentencing phase of the proceeding.

The trial court, in denying the relief requested, made the following findings:

> From the vantage point of hindsight of five years, defendant, through his present counsel, assaults the conduct of his defense by his former counsel. Although told that his former counsel was present for testimony, defendant did not choose to call him to explain his conduct of the trial and appeal. The State did not call former counsel. Nor did the Court. Thus, counsel whose conduct of the trial and appeal is in question did not testify.

Both defendant and the State did call attorneys to testify as expert witnesses. Opinions were expressed by them as to trial counsel's effectiveness. Defendant also made proffers as to racial attitudes in Taylor County as they existed at trial time and at the present as well as concerning defendant's background. Upon consideration, the court finds that the greater weight of the evidence does not support defendant's contention that he did not receive reasonably effective assistance of counsel.

Tactics of strategy of counsel at trial, just as tactics and strategy of counsel at the instant evidentiary hearing, are areas that the trial judge could frequently be tempted to question. The court attempts to refrain from doing so lest it usurp counsel's role.

Upon consideration of the evidence, the court finds that defendant received reasonably effective assistance of counsel at trial and upon appeal based upon the totality of the circumstances of these cases.

We affirm the ruling of the trial judge.

With reference to the asserted criticisms of trial counsel's conduct at jury selection, it must be recognized that the methods of jury voir dire are subjective and individualistic. Many experienced trial lawyers have a strong belief in short voir dire examinations. Conversely, others conduct as extensive an examination as the trial judge will allow. The views of what constitutes the best tactical approach are divergent, and the manner of the examination varies from community to community. What might be appropriate in Palm Beach or Fort Lauderdale may be unacceptable in Pensacola or Marianna. We find this record does not establish any identifiable deficiencies in appellant's trial counsel's voir dire examination; nor do we find his asserted failure to ask for additional peremptory

challenges an erroneous omission by counsel necessitating a conclusion of ineffectiveness.

We also reject the second contention that appellant's trial counsel was deficient by allowing evidence of the codefendant's participation in the crime. It clearly appears that defense counsel attempted to make the codefendant the more dominant participant. In fact, appellant's next assertion of deficiency is that defense counsel did not do enough to establish the dominance of his codefendant, both in the trial on the merits and in the penalty phase. This argument, to be valid, must as a predicate establish the codefendant as the undisputed dominant individual. That fact has not been established in the instant case. We recognize that the

dominant individual is a multi-party murder constitutes an important element, particularly where one participant receives the death sentence and the other, as in the instant case, receives only a life sentence. However, we have examined the total record in this cause and conclude that it reflects the codefendant was not the dominant force. We conclude that appellant's trial counsel provided reasonably effective assistance of counsel under the instant circumstances.

We reject the third assertion that defense counsel did not properly represent appellant in the sentencing phase of these proceedings. Appellant argues that trial counsel six years ago should have known what the law would be at this time. This is clearly without merit. See Parker v. North Carolina,

397 U.S. 790 (1970); Knight v. State, 394 So.2d 997 (Fla. 1981).

We find that appellant has failed to show that the asserted deficiencies of his trial counsel meet the requirements set forth in Knight v. State. As we said in Knight, "the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Id. at 1001. This, appellant has not done. The trial judge properly denied the motion for post-conviction relief, and we, accordingly, affirm.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur

An Appeal from the Circuit Court in and for Taylor County,

Royce Agner, Judge - Case No. 74-299-CF

Stephen D. Stitt and June Rice, Gainesville, Florida,

for Appellant

Jim Smith, Attorney General and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.